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MICHAEL RODAK, JR., C

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980
NO. 80-345

QUINAULT PACIFIC CORPORATION, INTERNATIONAL PAPER COMPANY, W. KENT BISHOP, WHITE LUMBER SALES, INC., and GOLD REY FOREST PRODUCTS, INC.,
Petitioners,

versus

AETNA BUSINESS CREDIT, INC., JOHN C. PENNINGTON, TRUSTEE, and FREEMAN & HAWKINS,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS JOHN C. PENNINGTON, TRUSTEE, and FREEMAN & HAWKINS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The Judgment of the Court of Appeals for the Fifth Circuit was entered on May 8, 1980. See Petitioners' Joint Appendix at 1. That Judgment affirmed the opinion of the United States District for the Northern District of Georgia, Atlanta Division, which is unreported. The District Court's opinion had affirmed an Order of the United States Bankruptcy Court, dated December 20, 1977.

QUESTION PRESENTED

Whether, based upon a review of the record in this case, the lower courts abused their discretion or were clearly erroneous in denying Petitioners' motion under Rule 60(b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This controversy arises from the bankruptcy proceeding of Georgia Paneling Supply, Inc. (the "Bankrupt"), which, though a no-asset case, has been pending in the Northern District of Georgia since July 29, 1974. (Vol. II, 332-341). Petitioners hold unsecured claims against the Bankrupt for goods sold on credit. (Vol. II, R-307-331). Respondent John C. Pennington is the bankruptcy trustee ("Trustee") for the Bankrupt and was elected to that position by Petitioners. (Supp. Vol. I, R-35). Respondent Aetna Business Credit, Inc. ("AETNA") is a commercial finance company, which, during 1973 and 1974, financed the accounts receivable and inventory of the Bankrupt.

In July of 1975, Petitioners pursuaded the Trustee to sue Aetna and The C&S Bank ("C&S") to recover the value of the Bankrupt's property upon which Aetna and C&S had foreclosed their respective security interests. (Supp. Vol. I, R-8). The theory of recovery was that Aetna and C&S had received voidable transfers under the bankruptcy laws as the result of their foreclosures. After reviewing the findings of a private investigator whom he had retained to develop the evidentiary support for his complaint, the Trustee determined that his claim against Aetna was not meritorious. (Supp. Vol. II, R-4-7).

Accordingly, the Trustee agreed to dismiss his claim against Aetna for his costs ($350) and requested the Bankruptcy Court to permit him to settle on that basis, leaving him free to pursue what he felt was a meritorious claim against C&S. (Vol. IV, R-933-934).

Despite the vigorous objections of Petitioners, the Bankruptcy Court after a hearing approved the proposed settlement on June 16, 1976, and denied the Petitioners' request to remove the Trustee from office for proposing the settlement. (Vol. II, R-373; see Petitioners' Joint Appendix at 66). On appeal the District Court affirmed the Bankruptcy Court's approval of the settlement. (Vol. III, R-552). However, by a separate order, the District Court permitted Petitioners to intervene into the Trustee's lawsuit to assert their own claims against Aetna and C&S, and those claims are still pending.

After the District Court's approval of the settlement, Petitioners filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure which requested that the settlement be nullified on the basis of alleged newly-discovered evidence. (Vol. III, R-558). The alleged newly-discovered evidence demonstrated, they argued, that Aetna never made a loan to the Bankrupt and therefore foreclosed upon the wrong company. Shortly before the hearing scheduled on their Rule 60(b) motion, Petitioners requested the Bankruptcy Court to continue the hearing for 35 days, to prohibit counsel for Aetna from participating in the hearing, to "incorporate by reference" as evidence in the hearing all discovery taken in the Trustee's lawsuit, and to set aside "two to three weeks" of its calendar to devote to the hearing. (Vol. II, R-268). The Bank-

ruptcy Court denied these several requests of Petitione s (Vol. II, R-263-267), who on the morning or the hearing filed with the District Court a notice of appeal and request for immediate review (Vol. II, R-260) and filed with the Bankruptcy Court a motion for a stay of the hearing and for a reassignment of the case to another bankruptcy judge who could set aside two weeks of his calendar for the hearing. (Vol. II, R-252-259). The Bankruptcy Court denied Petitioners' motion and the District Court denied Petitioners' appeal as "without merit" and "frivolous." (Vol. I, R-141). Following a two-day hearing on Petitioner's Rule 60(b) motion and the submission of documentary evidence (Supp. Vol. V, R-297-309), the Bankruptcy Court on December 20, 1977, denied their motion. The District Court affirmed that denial on appeal., (Vol. I, R-26) and the Court of Appeals for the Fifth Circuit likewise affirmed.

REASONS FOR DENYING WRIT

I. The Courts Below Fully Considered and Correctly Decided the Issues

The Bankruptcy Court, the District Court and the Court of Appeals for the Fifth Circuit fully considered the issues raised in the instant Petition. The judgment of the Bankruptcy Court was entered after a two-day hearing (Supp. Vol. I, R-1), and was affirmed on appeal by the District Court. (Vol. I, R-26). The Court of Appeals for the Fifth Circuit, after a full briefing of the issues and oral argument, affirmed the judgments below on May 8, 1980, and denied Petitioners' petition for reconsideration on June 3, 1980.

A motion for relief under Rule 60(b) is addressed to the sound discretion of the court: Hand v. U.S., 441 F.2d 529 (5th Cir. 1971), and must be balanced against the strong policy of achieving finality in litigation. See, In Re: Casco Chemical Co., 335 F.2d 645 (5th Cir. 1964). A determination on Rule 60(b) will not be disturbed absent a clear abuse of discretion. Martin v. H.M.B. Construction Co., 279 F.2d 495 (5th Cir. 1906); Darlington v. Studebaker-Packard Corp., 261 F.2d 903 (7th Cir. 1959), cert. denied 359 U.S. 992, 79 S.Ct. 1121. As the Fifth Circuit observed in its original order first denying Appellants' appeal, "This standard, stringent upon an initial review, can only be more difficult to meet where a second review is sought." In Re: Georgia Paneling Supply, 581 F.2d 520 (5th Cir. 1978).

II. There is No Conflict Among the Courts of Appeals

There is no conflict among the Courts of Appeals respecting any issue involved in the Petition. Petitioners cite no authority and present no arguments demonstrating a conflict. The Bankruptcy Court the District Court and the Fifth Circuit merely applied to Petitioners' allegations of newly-discovered evidence well-settled principles of law developed under Rule 60(b). In each instance, the lower courts concluded that Petitioners had failed to carry the burden of proof necessary to sustain their motion.

III. The Decision Below Was Correct on the Merits

It cannot be said that the findings of the Bankruptcy Court were "clearly erroneous." In fact, the finding of the Bankruptcy Court that the Appellants' assertions were in "many re-

spects frivolous" are clearly supported by the record. The Bankruptcy Court certainly did not "clearly abuse its discretion" in denying Appellants' requested relief under Rule 60(b)(2). There is nothing to indicate that a new trial would have altered the Bankruptcy Court's determination that the settlement was in the best interests of the estate.

IV. No Judicial Misconduct Occurred Below

The decision in this case is based upon and amply supported by facts and circumstances peculiar to it, all of which have been thoroughly sifted and reviewed by the lower courts. This Court should refrain from reviewing cases which turn on factual questions and which are devoid of any issues of public importance.

Petitioners brief is principally devoted to a tedious rehashing of facts largely at variance with the findings of the Bankruptcy Court. Petitioners' allegations of misconduct are untrue and without support in the record. The account of the facts set forth in the brief of the Respondent, Aetna Business Credit, Inc., is entirely accurate. Moreover, even if Petitioners' allegations of fact were taken to be true, they are legally insufficient as a basis for recusal or disqualification of the Bankruptcy Court.

CONCLUSION

For the reasons stated above, it is requested that Petitioners Petition for a Writ of Certiorari be denied.

Respectfully submitted,

HOWELL HOLLIS, III, Counsel of Record for Respondents John C. Pennington, Trustee, and Freeman & Hawkins

Douglas L. Cronkright, Counsel for Repondents John C. Pennington Trustee, and Freeman & Hawkins

Richard D. Flexner, Counsel for Respondents John C. Pennington, Trustee, and Freeman & Hawkins

John C. Pennington, Counsel for Respondents John C. Pennington, Trustee, and Freeman & Hawkins

AFFIDAVIT OF SERVICE

STATE OF GEORGIA

COUNTY OF FULTON

John C. Pennington, being first duly sworn, deposes and says that he served three copies of the foregoing Brief upon counsel for Petitioners and three copies of said Brief upon counsel for Respondent Aetna Business Credit, Inc. by depositing same in the United States Mail, with first class postage prepaid, addressed as follows:

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and that all parties required to be served with a copy of the foregoing Brief have been served.

This 6th day of October, 1980.

John C. Pennington

Sworn to and subscribed before me, this 6th day of October, 1980.

S. Dale Wilkes
Notary Public
Notary Public, Georgia, State at Large
My Commission Expires May 14, 1983